83 - 1852

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

KENNETH HARDING MORRIS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

DOES A FEDERAL CRIMINAL DEFENDANT, WHO IS A WHITE MALE, HAVE STANDING TO CHALLENGE THE PURPOSEFUL DISCRIMINATORY EXCLUSION OF BLACKS, WOMEN AND HISPANICS FROM THE POSITION OF GRAND JURY FORMAN?

II.

WHETHER THE EXCLUSION OF EXPERT PSYCHOLOGICAL TESTIMONY DEMONSTRATING PETITIONER'S SPECIAL SUSCEPTIBILITY TO SEXUAL ENTRAPMENT VIOLATED HIS RIGHT TO PRESENT DEFENSIVE EVIDENCE OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT?

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TO THE HONORABLE COURT:

Comes Now the Petitioner, KENNETH HARDING MORRIS, who petitions this Honorable Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the

Fifth Circuit and would show the Court as follows:

DECISION BELOW

The opinion in this case by the United States Court of Appeals for the Fifth Circuit was delivered in No. 83-1280 on March 5, 1980. It was not published and is attached in the Appendix. There was no district court opinion.

JURISDICTION

On March 5, 1984, the United States Court of Appeals for the Fifth Circuit issued a judgment vacating Appellant's convictions on Counts 2 and 3 of his indictment and affirming his conviction on Count 4. (App., p. 25-A.) The Petition for Rehearing and Suggestion for Rehearing En Banc were denied on April 4,

1984, and Petitioner's Motion for Stay of Mandate was granted by the court of appeals until May 11, 1984, pursuant to Fed. R. App. P., Rule 41(b). (App., pp. 27-A, 30-A.) The jurisdiction of this Court to review the judgment of the Fifth Circuit is provided by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

(A) U.S. Const. amend. V provides in pertinent part:

> No person shall...be deprived of life, liberty, or property, without due process of law....

(B) Fed R. Crim. P., Rule 6(c) provides:

> Foreman and Deputy Foreman. The Court shall appoint one of the jurors to be foreman and another to be deputy foreman. The foreman shall have power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreman, the deputy foreman shall act as foreman.

(C) Fed. R. Crim. P., Rule 12.2(b) (1975):

> Mental Disease or Defect Inconsistent with the Mental Element Required for the Offense Charged. If a defendant intends to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall,

> within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk.

STATEMENT OF THE CASE

Petitioner was indicted on four counts of distribution of cocaine in violation of 21 U.S.C. §841(a)(1). Prior to trial Petitioner moved to dismiss his indictment because of the discriminatory selection of grand jury foremen. That motion alleged that blacks, women and Hispanics were systematically and discriminatorily excluded from the position of grand jury foreman in the Northern District of Texas, and that exclusion violated the Due Process Clause of the Fifth Amendment. In support of this

motion a stipulation of evidence was entered reflecting that of 22 foremen serving between 1975 and 1982, 20 were white, 18 were male, 2 were women and 2 were of unknown race and gender. At a pretrial hearing the district court denied the motion on alternate grounds: (1) discrimination in the selection of grand jury foreman is constitutionally insignificant and cannot require dismissal; and (2) assuming such an attack is proper, any prima facie case of discrimination was rebutted by the affidavit of the district judge who selected the foreman of the grand jury which indicted Petitioner. (App. 37-A, 38-A.)

Petitioner pleaded not guilty to all four counts alleged and proceeded to trial before a jury. During the trial,

Petitioner admitted the acts alleged, but raised the defense of entrapment. The theory of Petitioner's defense was that he had been induced to sell cocaine on four occasions by the promise of affection and sex from a female undercover agent, Jan Forsyth.

To prove Petitioner's special susceptibility to sexual inducements, he called Dr. Rycke Marshall, a clinical psychologist, and Dr. James P. Grigson, a psychiatrist. Their testimony showed that Petitioner, based upon his psychological makeup, was more likely than the average person to be manipulated by women who pretended to show him affection. The district court excluded their testimony from the jury's consideration based upon the failure of Petitioner's counsel to

give pretrial notice of their testimony pursuant to Fed. R. Crim. P., Rule 12.2. (App., pp. 41-A - 47-A.) Following the exclusion of this evidence, the Petitioner was acquitted by reason of entrapment on Count 1, but he was convicted on Counts 2, 3 and 4 for which he was sentenced to two concurrent four-year terms and a concurrent ten-year term respectively.

Petitioner appealed his convictions to the United States Court of Appeals for the Fifth Circuit raising, among other issues, the failure of the district court to dismiss Petitioner's indictment because of discriminatory grand jury foreman selection and the court's exclusion of the expert testimony on Petitioner's special susceptibility to sexual inducement.

The court of appeals did not reach the merits of the foreman issue. Relying on United States v. Cronn, 717 F.2d 164 (5th Cir. 1984), cert. pending, the court held that Petitioner, a white male, lacked standing to attack the exclusion of minorities from the office of grand jury foreman. Despite the Government's failure to challenge Petitioner's standing and despite Petitioner's reliance upon Peters v. Kiff, 407 U.S. 493 (1972) as his basis for standing, the court of appeals held that Petitioner had made only an equal protection claim which he did not have standing to make. (App., pp. 16-A - 17-A.)

As for the exclusion of the testimony of Drs. Marshall and Grigson, the court of appeals indicated that the district

court may have erred in finding exclusion of the testimony was justified on the basis of Fed. R. Crim. P. Rule 12.2. (App., p. 19-A.) However, it held that under the concurrent sentence doctrine there was no need to discuss Rule 12.2. After vacating the convictions on Counts 2 and 3, the court found that there was no evidence of sexual entrapment on Count 4, the longest concurrent sentence. Without such evidence, the court believed that the district court's exclusion was not error. (App., p. 21-A.) Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc were denied on April 14, 1984. (App., p. 27-A.) It is this adverse judgment for which Petitioner seeks review by this Court.

REASONS FOR REVIEW

I.

STANDING

The issue of whether a white male has standing to seek dismissal of his indictment on the basis of discriminatory exclusion of minorities from the office of grand jury foreman has caused a significant split among the federal courts of appeals. The holding by the Fifth Circuit below, following United States v. Cronn, 717 F.2d 164 (5th Cir. 1983), cert. pending, that Peters v. Kiff, 407 U.S. 493 (1972), did not provide standing for Petitioner's attack on the unconstitutional selection of federal grand jury foremen is in direct conflict with decisions by the Eleventh Circuit in United States v. Perez-Hernandez, 672 F.2d 1380

(11th Cir. 1982), United States v. Holman, 680 F.2d 1340 (11th Cir. 1983), and United States v. Cross, 708 F.2d 631 (11th Cir. 1983), cert. pending. The Fifth Circuit in Cronn recognized that it was creating such a split in the circuits and that split is continued in this case. The decision below also implicitly conflicts with the Fourth Circuit's opinion in United States v. Hobby, 702 F.2d 466 (1983), cert. granted, wherein that court decided the merits of the attack by the appellants, who were male, on the exclusion of women from the foreman's position. The decision in United States v. Coletta, 682 F.2d 820 (9th Cir. 1982), in harmony with the decisions by the Fifth Circuit, adds to the conflict which now involves differing opinions in four

circuits. This conflict should be resolved.

The issue of standing in this kind of case is an important one which should be settled by this Court. Attacks on the discriminatory selection of grand jury foremen have often been made in the courts below. See, e.g., United States v. Abell, 552 F.Supp. 316 (D. Me. 1982); United States v. Musto, 540 F. Supp. 346 (D.N.J. 1982); United States v. Carbrera-Sarmiento, 533 F.Supp. 799 (S.D. Fla. 1982); United States v. Breland, 522 F.Supp. 468 (N.D. Ga. 1981); United States v. Layton, 519 F. Supp. 946 (N.D. Cal. 1981); United States v. Manbeck, 514 F.Supp. 141 (D.S.C. 1981); United States v. Jenison, 485 F.Supp. 655 (S.D. Fla. 1979). It is likely that such challenges

will continue. Because of the uncertainty in the application of the Peters v. Kiff doctrine, standing will continue to be a major issue unless resolved by this Court.

The decision in Petitioner's case by the Fifth Circuit takes too narrow a view of the standing allowed by Peters v. Kiff. Petitioner's factual allegations and proof clearly demonstrated arbitrary exclusion of women and blacks from the position of grand jury foreman in violation of the Due Process Clause of the Fifth Amendment. At best only 18.2% of the foremen from 1975 to 1982 were women and only 9.1% of them were blacks. These figures differed from the general population by 34.2% and 4% respectively.

The court below decided that the failure to denominate the attack as a "due process" violation of the Due Process Clause took Petitioner outside the coverage of Peters even though it was clearly understood by the district court to be the basis of Petitioner's standing the only time it was discussed. (App., p. 48-A.) To hold that Petitioner should be denied standing where the facts he alleges otherwise show a violation of the Fifth Amendment disregards the reasons for the decision in Peters. There, in the opinion by Justice Marshall it was stated:

> In light of the great potential for harm latent in an unconstitutional jury-selection system, and the strong interest of the criminal defendant in avoiding that harm, any doubt should be resolved in favor of giving the opportunity for

> challenging the jury to too many defendants, rather than giving it to too few.

Peters, 407 U.S. at 504 (footnote omitted). Similar policy considerations were involved in Justice White's opinion in Peters, which was based upon statutory grounds. Id. at 506-07.

The most compelling proof that Petitioner's claims were adequately based upon due process is provided by a comparison of this case with Hobby v. United States, No. 82-2140, in which this Court granted certiorari on December 12, 1983, and United States v. Cross, No. 83-1037, in which the Government filed a petition for writ of certiorari to the Eleventh Circuit. In acquiescing to the grant of certiorari in Hobby, the Government noted that at the district court level Hobby

had stated his claim in terms of "'discrimination' (presumably in violation of the equal protection component of the Due Process Clause)." (Hobby Br. 5 n.2.) The Government also went on to state: "On appeal, defendants' claim rested exclusively upon alleged underrepresentation of blacks and women among forepersons, and was predicated entirely upon an equal protection theory [cite omitted]." (Hobby Br. 6 n.2 cont.) This claim was supported by citation only of Duren v. Missouri, 439 U.S. 357 (1979), Taylor v. Louisiana, 419 U.S. 522 (1975), and Peters v. Kiff, 407 U.S. 493 (1972). (Id.)

Likewise in Cross, the Government noted that Cross' attack on his indictment was not clear as to whether it was

based upon due process, equal protection or both. According to the Government's petition in Cross, "Respondent claimed the underrepresentation of blacks and women in the position of foreperson reflected a 'constitutional violation of [his] Fifth Amendment due process rights' [cite omitted]." (Cross Pet. 4.) The only clarification of Cross' claim apparently was his citation of Peters v. Kiff, 407 U.S. 493 (1972), and Duren v. Missouri, 439 U.S. 357 (1979). (Cross Pet. 4 n.6.)

The due process nature of Petitioner's claim and the basis of his standing is at least as clear as that of Hobby and Cross. The claims of Hobby and Cross, which were sufficiently based upon due process to provide them with

standing, also clearly demonstrate that the Petitioner's claim was more than adequate to invoke the protections of the Due Process Clause.

The rigid compartmentalization of Petitioner's claim as only an "equal protection" claim for which he supposedly lacked standing, even though alleged as a violation of the Fifth Amendment's Due Process Clause, calls into question the proper scope of standing under Peters, and also whether standing should have been dispensed in such a niggardly manner as it was in the court below. The courts of appeals have struggled with this question, reaching conflicting results. In order to resolve this conflict and set out the limits on standing pursuant to Peters v. Kiff, this court should grant Petitioner's

request for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

II.

EXCLUSION OF DEFENSIVE EVIDENCE

The decisions by the courts below excluding the expert psychological testimony from Dr. Marshall and Dr. Grigson denied Petitioner his right to due process under the Fifth Amendment. This denial of due process results from the fact that Petitioner was barred from presenting important, relevant evidence in his defense. The exclusion of this evidence demonstrating Petitioner's special susceptibility to the sexual inducement used by Government agents is in conflict with prior precedent of this Court re-

garding a defendant's due process right to offer defensive evidence in his behalf and should be reviewed.

The protections provided by the Due Process Clause of the Fifth Amendment are myriad. In Chambers v. Mississippi, 410 U.S. 284 (1973), this Court considered the application of the Due Process Clause to the exclusion of important exculpatory evidence and found that in a criminal prosecution this multitude of protections essentially means one thing: "the right to a fair opportunity to defend against the State's accusations." Id. at 294; see also, Jenkins v. McKeithen, 395 U.S. 411, 429 (1969). In particular this opportunity that a defendant has to defend against criminal charges entails the fundamental right to present wit-

nesses in his own defense. Id. at 302; Webb v. Texas, 409 U.S. 95, 98; Washington v. Texas, 388 U.S. 14, 18-19 (1967). The testimony of Dr. Marshall and Dr. Grigson was critical to Petitioner's only defense, that of entrapment.

It is true that the right to present witnesses is not absolute, but may be limited by procedural rules designed to achieve fairness and accuracy. In Chambers, though, this Court made it clear that such rules cannot be mechanistically applied to defeat the ends of justice. Chambers, 410 U.S. at 302. In Petitioner's case, however, all of the applicable rules have been followed with respect to the excluded psychological testimony. Its exclusion rests not on

the strict application of these rules of procedure or evidence, but rather misapplication of certain rules. Thus, Petitioner's case is even more compelling than either Chambers or Washington wherein the defendants were attacking well-established state procedures. The Petitioner should not be subjected to the arbitrary and incorrect application of rules which only served to prevent him from fully defending himself against the charges made against him.

The courts below relied upon two different rules for excluding the expert testimony on Petitioner's special susceptibility to sexual entrapment: (1) the court of appeals held that there was no evidence of sexual inducement involving the transaction alleged in Court 4 of the

indictment, and thus, presumably the excluded testimony was irrelevant; and (2) the district court excluded the evidence based upon Petitioner's failure to comply with the notice requirements of Fed. R. Crim. P., Rule 12.2. Neither of these holdings correctly applies the rules relied upon, but they both result in a denial of Petitioner's due process right to defend himself in conflict with the clear holding of this Court.

The court of appeals affirmed the district court's exclusion of expert psychological testimony on Petitioner's susceptibility to sexual inducement as to Count 4 which involved the last sale of cocaine. The entire basis of that decision was the purported lack of evidence of sexual entrapment surrounding that

December 28th sale. The testimony of Petitioner clearly shows sexual inducement involving the last sale. The jury was entitled to believe this testimony, and in fact, after a full day of deliberation reached an impasse on the Petitioner's guilt as to all counts which required giving a "dynamite charge." Further, the district court must have believed that there was at least some evidence of sexual entrapment involving Count 4, or he would not have submitted a charge on the defense of entrapment on all counts as he did.

The clearest evidence of the presence of sexual inducement on Count 4, as well as the other counts, comes from Petitioner's testimony on cross-examination. During questioning by Mr.

Alexander, the Assistant United States Attorney, the following exchange occurred:

> MR. ALEXANDER: "Then the thrust of your testimony is that your sole purpose in supplying the cocaine to the two undercover officers was that you thought that you would get to have sexual relations with Jan Forsyth if you did?"
>
> MR. MORRIS: "That is exactly why I did it."

There was also evidence that following the third cocaine transaction (Count 3), but before the fourth sale on December 28th (Count 4), Officer Forsyth accompanied Petitioner to his home. While there, she and Petitioner exchanged a passionate kiss. Forsyth then told Morris "'Look, we don't have time. I don't want to get all -- I don't want to get started in something we can't

finish.'" She told Morris that she could not stay, "but she said 'As soon as this business was over with we will definitely get together.'" During this meeting at Petitioner's house the following conversation also took place:

> MR. MORRIS: ". . . I said 'What about us just going out of town and partying for a few days and when we get back maybe I can do a little better' and she just said 'Well, when we get through with this business then we'll party.'"

These enticements by Forsyth of a romantic liaison following the conclusion of "business" coupled with the intimate circumstances of kissing on the couch in the Petitioner's living room and a prior evening of dining and dancing at a nightclub unmistakeably demonstrate the sexual inducement which was Petitioner's motivation for the sale in Count 4. If

these facts do not provide at least some evidence of sexual entrapment involving Count 4, it is difficult to imagine what would. The jury could easily have believed Morris' testimony, and perhaps would have believed him had they been allowed to hear the critical defensive evidence provided by Drs. Marshall and Grigson together with his testimony. However, the Petitioner was improperly denied the opportunity to present this evidence to the jury through the district court's unconstitutional misapplication of Fed. R. Crim. P., Rule 12.2.

The only way that the court of appeals could have found no evidence of sexual entrapment in light of the testimony highlighted above was to totally disregard Petitioner's testimony. Such

an analysis, if followed, would lead to the exclusion of entrapment evidence as irrelevant whenever there is any testimony which negates the existence of improper inducement. This approach flies in the face of common sense and sound legal principle. If the jury could have believed Petitioner was sexually enticed into delivering cocaine as charged in Count 4, then the excluded testimony as to Petitioner's special susceptibility to such enticements tended to make it less probable that Petitioner had the predisposition to sell cocaine. See, Fed. R. Evid., Rule 403. Because the evidence excluded, when considered with Petitioner's testimony, could have changed the jury's verdict, its exclusion violated Petitioner's rights under the

Due Process Clause.

The district courts' invocation of Rule 12.2(b) and (d)(1975) to exclude this expert evidence was also an improper application of a procedural rule which impaired the Petitioner's defense. Rule 12.2(b), at the time of trial, by its plain language applied only to mental conditions "bearing upon the issue of whether he had the mental state required for the offense charged." The expert testimony offered related only to showing the Petitioner's special susceptibility to the kind of inducement involved in this case, increasing the likelihood that Defendant was entrapped by the Government.

The defense of entrapment does not negate or diminish any mental element of

the offense charged. Rather, as a policy matter convictions cannot be had where the Government created and instigated the defendant's conduct. In Sorrells v. United States, 287 U.S. 435 (1932) the Supreme Court held that as a matter of judicial policy an entrapped defendant could not be convicted. "The defense is available, not in view that the accused though guilty may go free, but that the government cannot be permitted to contend that he is guilty of a crime where the government officials are the instigators of his conduct." Id. at 452. This was reaffirmed in United States v. Russell, 411 U.S. 423 (1973) wherein the Court stated that the entrapment defense is rooted "in the notion that Congress could not have intended criminal punishment for

a defendant who has committed all the elements of a prescribed offense but was induced to commit them by the government." Id. at 435 (Emphasis added).

The Petitioner is charged with intentionally or knowingly distributing cocaine. Intent or knowledge are the mental states required for the offense charged. The Petitioner admitted that he intended to sell the cocaine. However, he was improperly induced to do so and under entrapment principles the Government was prevented from obtaining a conviction. Clearly, there is no issue or question as to the existence of the culpable mental state for distribution of cocaine. Rather, the issue to which the expert testimony related was the impact upon Petitioner of the improper induce-

ments, such as the promise of affection and sex, for the purpose of proving the policy defense of entrapment and not negation of the required mental state for distributing cocaine.

The recent 1983 amendment of Rule 12.2(b) also supports Petitioner's contention that he was not required to give notice of expert testimony on his susceptibility to inducement before introducing this important defensive evidence. Rule 12.2(b) now requires notice prior to introducing expert testimony:

> [r]elating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of his guilt. . . . (Emphasis added.)

This broader language, which was not in effect at trial, would appear to now cover Petitioner's case. However, it was

necessary to expand the language from mental conditions bearing upon the existence of the mental state required for the offense to mental conditions bearing upon the issue of guilt before the entrapment situation would be included. This indicates that, in the absence of the amendment, Rule 12.2(b) did not cover expert testimony involving the entrapment defense.

Further support for Petitioner's position is found in United States v. Hill, 655 F.2d 512 (3d Cir. 1981). There the trial court excluded expert testimony on the susceptibility of the defendant to entrapment for failure to give Rule 12.2 (b) notice. The court stated:

> There being no clear application of Rule 12.2(b) to an entrapment defense, we face the question of whether the language of Rule 12.2(b) gives fair notice that it will be

> applied to the characteristic of susceptibility in an entrapment defense. An entrapment defense was distinguished from an insanity defense in United States v. Mosley, 496 F.2d 1012, 1017 (5th Cir. 1974), where the court held that a waiver of an insanity defense does not constitute a waiver of an entrapment defense.
>
> Given the lack of a clear indication that Rule 12.2(b) will apply to an entrapment defense, we find it an insufficient basis to exclude the proffered testimony in this case.

Id. at 518. Likewise, it is an insufficient basis for exclusion herein. The district court's exclusion of this highly relevant and important testimony was not proper under Rule 12.2(b) or (d), and denied Petitioner his fundamental right to present a defense.

There are two other bases for the admission of this expert testimony on the

issue of the susceptibility of a defendant to inducement as an integral part of an entrapment defense, Fed. R. Evid., Rule 702, and Rule 405(a). The Court of Appeals for the Third Circuit stated in Hill:

> An expert's opinion, based on observation, psychological profiles, intelligence tests, and other assorted data, may aid the jury in its determination of crucial issues of inducement and predisposition. This is the purpose ascribed to expert testimony by Federal Rules of Evidence Rule 702, and it appears most applicable to the instant case. A jury may not be able to properly evaluate the effect of appellant's subnormal intelligence and psychological charateristics on the existence of inducement and predisposition without the considered opinion of an expert.

Hill, 655 F.2d at 516.

The alternative basis for admission of the included testimony is Fed. R.

Evid., Rule 405(a). This rule allows proof of relevant character traits by expert opinion testimony. See, United States v. Curtis, 644 F.2d 263 (3d Cir. 1981). The excluded testimony here could be classified as opinion testimony on the character trait of susceptibility, which is highly relevant to the determination of the existence of predisposition in an entrapment defense. The court in Hill held that this type of evidence was properly admissible under Fed. R. Evid., Rule 405(a). See, also, United States v. Staggs, 553 F.2d 1073 (7th Cir. 1977)(error to exclude expert opinion evidence on a relevant character trait). These two rules, 702 and 405(a), provide affirmative bases for the admission of the unconstitutionally excluded testi-

mony.

The exclusion of the testimony from Dr. Grigson and Dr. Marshall was not proper on any procedural ground. More importantly, it is not reconcilable with the holdings of this Court which have made clear the fundamental importance of the due process right to present a defense. Although trial judges have discretion in excluding evidence, where there is no proper basis for exclusion of evidence which may very well have changed the jury's verdict, exclusion is a clear abuse of discretion and a denial of due process which should be reviewed by this Court.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioner, KENNETH HARDING MORRIS, prays

that this Court grant his petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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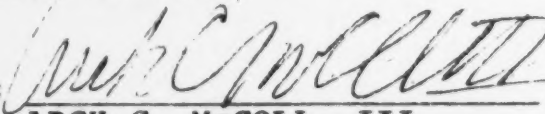
BY: 
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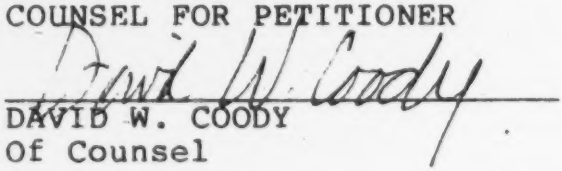
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Of Counsel

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OCTOBER TERM, 1983

KENNETH HARDING MORRIS
Petitioner

V.

UNITED STATES OF AMERICA,
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APPENDIX

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KENNETH HARDING MORRIS,

Defendant-Appellant.

Appeal from
the United States District Court
for the Northern District of Texas

(MARCH 5, 1984)

Before BROWN, REAVLEY and WILLIAMS, Circuit Judges

PER CURIAM:

Appellant challenges his convictions on three counts of distributing cocaine, arguing denial of equal protection of the laws in the selection of the

foreman of the federal grand jury which indicted him, error of the Trial Court in excluding expert testimony on his particular susceptibility to sexual inducement, and failure by the Government to sufficiently disprove his claim of entrapment. We reject each of his claims and affirm the judgment as modifed.

The jury reasonably could have found the following version of the circumstances of this prosecution.

The defendant is a 42 year old divorced anglo male who lived in Dallas, Texas. For a couple of years prior to his arrest, Morris used cocaine. He stopped for a short period in the spring and summer of 1982. That summer he was briefly (and sexually) involved with Dianne Mayo. He had met Mayo at a party

two years before where she had given him cocaine. Toward the end of the summer. Mayo began to pester Morris to obtain cocaine for her. He refused her requests as he was not using the drug.

In October of 1982, Mayo contacted the Federal Drug Enforcement Agency (DEA) to offer her help in obtaining convictions in narcotics trafficking. Thereafter, her requests to Morris for cocaine became more insistent and frequent. She began telling him about a childhood friend who was supposedly coming down from New York to visit. She said her friend, whom she called Julie Williams, wanted cocaine to take back to New York. She also said that Williams was to be in town to get away from her husband and to "party."[1] Williams was in fact 29 year old Dallas

---

[1]Morris testified that he believed

Police Department (DPD) narcotics investigator Jan Forsyth.

After much badgering by Mayo, Morris agreed to get and sell to Mayo and Forsyth one-eighth of an ounce of cocaine. The three met at a North Dallas coffee shop on November 19, 1982, where Morris saw Forsyth for the first time. Forsyth purchased the small baggie of cocaine from Morris for $300, in a hallway near the restrooms of the restaurant. DEA Special Agent Kenneth Lee and Forsyth's DPD partner Kirt Griffith observed the meeting (but not the actual transfer of cocaine and money) from a nearby table. Neither Forsyth nor

---

Footnote 1 Continued
to "party" meant to "do cocaine and have sex." Mayo did not testify at trial.

Morris mentioned sex, sexual favors, or her "going to bed" with him.

Between then and early December, Mayo repeatedly called Morris about a larger quantity of cocaine for her and Forsyth. Morris eventually obtained one-quarter of an ounce of cocaine to sell to Mayo and Forsyth in late November. At that point he had only seen Officer Forsyth once, at the November 19th sale.

On December 1, 1982, Morris met with the two women at another local restaurant. He took Forsyth for a short drive in the neighborhood around the restaurant, pulled the car over on a side street, and parked. He suggested that Forsyth and he go to a restaurant sometime or meet for a drink, to which she agreed. He also asked about the two

of them "partying" together. During this conversation, Forsyth never herself mentioned sex, nor did she reveal any intimate part of her body to him. Moreover, neither person made a "pass" at or otherwise propositioned the other. Rather, Forsyth told Morris that she was staying with her boyfriend there in Dallas. The subject of the conversation then moved to Mayo, and they agreed to exclude her from any future cocaine transactions. So she could contact him directly, Morris gave Forsyth his phone number. Finally, Forsyth gave Morris $600 for the one-quarter of an ounce of cocaine. They drove back to the restaurant, and, before she got out of the car, Morris kissed the officer on the cheek. He then drove off.

Agent Lee and Officer Griffith observed from a parking lot near the restaurant.

From then on, Mayo was no longer involved. Forsyth began calling Morris herself, inquiring about when he could get more cocaine for her. She realized that he was expecting her to "party" with him, but she attributed that just to "him being a man. . . . When they meet a girl from out of town that is naturally what they expect."

At this point, Forsyth called to suggest that they meet one evening at a local bar to discuss the next deal. They eventually did, and there they drank and danced one or two "slow songs." When she arrived, however, she had told him that she could not stay long because she had told her boyfriend that she was there

only to "talk business." Nevertheless, Morris talked about going to South Padre Island or Jamaica or a Caribbean island to do the cocaine deal. Forsyth declined his invitations, saying that since her boyfriend was buying half of the cocaine, the deal had to be in Dallas. During the evening Morris also suggested that he and Forsyth should "go to bed at least as friends." She again declined his invitation, emphasizing that she was there "for business" and was "not interested in that." When she had to leave, Morris walked her to her car and again kissed her.

Thereafter, Forsyth persistently inquired by phone about more cocaine for her and her supposedly wealthy boyfriend, whom she called Mike Novak. In fact,

Novak was her partner, Officer Griffith. Forsyth arranged for the three to meet at a local Mexican restaurant on December 10 to discuss the next deal. There, Morris and Griffith met for the first time. Forsyth and Griffith ultimately agreed to buy one full ounce of cocaine from Morris, although they expressed a desire for a much larger amount.

Forsyth contacted Morris the next day, on December 11, 1982. Morris confirmed that he could get one ounce of cocaine and sell it to them for $2,300.00. Forsyth agreed, and the three met at the same coffee shop as for the first sale.[2] Morris took the officers for a short drive and, as usual, pulled over on a side street. He handed Griffith a

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[2]Significantly, before this meeting Morris was having serious second thoughts about the cocaine deals:

plastic baggie of what he said was one ounce of very good cocaine. Once

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Footnote 2 Continued

> During this period of time - I began to get a little bit worried because all of a sudden -- she had been leading me on and on and on about going to bed with me and I had gotten her cocaine on two different occasions and yet she still hadn't gone to bed with me so I was beginning to have doubts about who she was.

Such were his doubts that he in fact asked both Forsyth and Griffith at this meeting whether they were police officers. Forsyth related a different story about Morris' concerns:

> He [Morris] told me point blank that he can't understand why I am buying an eighth of an ounce and a quarter of an ounce and and all of a sudden I wanted to jump up to a pound and he said 'I don't know who you are.' He started looking at my purse and saying 'Are you a cop?'

satisfied that it was what he represented, Forsyth handed Morris $2,300 (in $100 bills). The trio discussed a much larger deal. In a short time, Morris drove back to the restaurant, dropped off the officers, and left. Special Agent Lee observed from across the street.

Over the next couple of weeks Forsyth called about the cocaine deal "just about every day." By the 18th of December she understood that Morris could get a half-pound to sell to her for $18,000. Morris said he was waiting for the cocaine to arrive.

During this period, Forsyth contacted Morris to meet with her for a few minutes at a local restaurant to discuss the deal. He was waiting when she arrived and invited her to take a drive.

Morris drove to his house. There, he showed her a batch of cocaine he had recently obtained and informed her that he was in the process of getting the half-pound of cocaine. Forsyth stayed 20 or 25 minutes and then left on a pretense.

On December 28, 1982, Forsyth called Morris, and he stated that the cocaine was finally in. They agreed to meet at a local restaurant later that evening to consummate the agreement. Morris was waiting when Forsyth and Griffith arrived at the restaurant. All three went back outside to let Morris check the $18,000. He then invited the officers for a drive to show them the cocaine. They got into a car driven by George Anderton, whom Morris introduced

as his partner who had come along for the deal. Anderton drove a short distance and parked. He took two baggies of one-quarter of a pound of cocaine each from his boots and handed them to Griffith. Griffith tested the powder to see whether it was cocaine. It was, and, satisfied, the officers and Anderton and Morris returned to Griffith's car in the restaurant parking lot. There, Griffith and Forsyth (with Agent Lee's and other officers' help) arrested Morris and Anderton.

Morris was indicted on four counts of distribution of cocaine in violation of 21 U.S.C. § 841(a)(1). He pleaded not guilty to all counts by reason of entrapment. After a jury trial, he was acquitted of count 1 (the

November 19 sale) and convicted of counts 2 (December 1), 3 (December 11), and 4 (December 28). The Trial Judge denied his motion for acquittal and sentenced him to four years in prison for counts 2 and 3 to run concurrent with ten years in prison for count 4. Morris also received a three-year special parole term on each count and a fine of $10,000. He appeals.

Morris first challenges the validity of his federal indictment, claiming that he was denied equal protection of the laws in the selection of the foreman. It was stipulated at trial that of 22 federal foremen serving between 1975 and 1982 in the Northern District of Texas, 18 were white males and 2 were white females (the race and gender of two foremen were not known). Morris moved to

dismiss his indictment, arguing that the selection process of federal grand jury foremen (and his in particular) denied him equal protection of the laws as embodied in the Fifth Amendment. To rebut his claim, the Government introduced the affidavit of the District Judge who had picked the foreman of the grand jury which indicted Morris. That Judge indicated that he had considered neither race nor gender in choosing that foreman or any of the three other foremen he had chosen. Although expressing some doubt that a white male had standing to assert the claim, the Court below rejected Morris' motion on the merits. It held that the position of foreman on a federal grand jury is purely ministerial and of no constitutional significance, and that,

in any case, the Government had rebutted any prima facie claim Morris had made.

Admittedly, the substance of Morris' contention is not resolved in this Circuit.[3] See United States v. Cronn, 717 F.2d 164, 166 (5th Cir. 1983). But see United States v. Aimone, 715 F.2d 822 (3d Cir. 1983) (position of federal foreman is not constitutionally significant); United States v. Hobby, 702 F.2d 466 (4th Cir. 1983); contra United States v. Cross, 708 F.2d 631 (11th Cir. 1983); United States v. Perez-Hernandez, 672 F.2d 1380 (11th Cir. 1982). However, it is settled in this Circuit that a white male defendant -- like Morris -- cannot assert, on equal protection grounds, a claim that women or racial

---

[3]Here, of course, we deal with a challenge to the selection process for foremen of federal grand juries. Cf. Guice v. Fortenberry, 661 F.2d 496 (5th

minorities are excluded from being federal grand jury foremen. United States v. Cronn, 717 F.2d 164, 169 (5th Cir. 1983). For this reason, we reject Morris' claim.[4]

Morris next asserts that the Trial Judge improperly excluded two expert witnesses tendered for his entrapment defense. He stated that a psychiatrist and clinical psychologist would testify in his behalf on his unique susceptibility to sexual enticement. Their testimony, as proffered for this appeal, would have been that the extreme indifference of his mother and father left Morris unusually open to the

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Footnote 3 Continued
Cir. 1981) (en banc) (state grand jury foremen); see also Guice v. Fortenberry, 722 F.2d 276 (5th Cir. 1984).

[4]We do point out that the reply brief filed on Morris' behalf seems to imply --in an apparent effort to circumvent the holding in Cronn -- that Morris

asserted sexual temptation of Officer Forsyth. The Trial Judge excluded the testimony under F.R.Crim.P. 12.2(d) because Morris failed to provide the proper notice to the Government. The Court observed that Morris' counsel had retained the experts long before trial. It then found the proffered testimony to be "expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether [Morris] had the mental state required

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Footnote 4 Continued
raises a due process (as well as an equal protection) challenge to the federal foreman selection process. This is clearly not what Morris presented to the District Court. We cannot and will not entertain an argument presented for the first time to this Court. See United States v. Cronn, 717 F.2d 164, 166 (5th Cir. 1983).

for the offense charged" F.R.Crim.P. 12.2(b).

Morris argues to the contrary. He says that his intent to distribute the cocaine was admitted. Rather, he contends, the expert testimony goes only to his particular vulnerability to entrapment by the Government, citing in support United States v. Hill, 655 F.2d 512 (3d Cir. 1981).

Morris' point may -- but we stress the may -- have some merit.[5] However, under the concurrent sentence doctrine, we need not decide the issue today. Morris was convicted of three counts of distributing cocaine with the two four-year sentences for counts 2 and 3 to run concurrent with the ten-year

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[5]We do not decide here the admissibility or value of expert testimony concerning a defendant's susceptibilities to sexual entrapment. However, we would

Footnote 5 Continued

express some doubt about such testimony. As summed-up by the tendered psychiatrist, the experts for Morris would have shown the following:

> Q: Do you feel then, Doctor, that because of the lure that was placed in front of him [Morris] by the government through the beautiful woman that his will was simply overborne?
>
> A: Well, I don't know that was his will but that is --
>
> Q: From a psychological standpoint?
>
> A: Well, his lust, his need for affection were fueled or inflamed is really what happened.
>
> Q: And as a consequence of that fueling and inflaming do you feel that that was a stronger impetus than the normal kind of conscious [sic] that would keep you in check?
>
> A: Sure it was.

sentence on count 4. We find no evidence of sexual entrapment surrounding the December 28 sale of one-half of a pound of cocaine for $18,000 which constituted count 4.[6] Accordingly, we affirm the Court's decision to exclude the expert

Footnote 5 Continued

Q: Okay. So while at the same time knowing right from wrong it was just more than he could control basically to be that enticed and that promised by that kind of lure?

A: It was pretty much like whenever you are a teenager growing up and your parents say 'Don't fool around' and you fool around.

That such evidence would be material to an entrapment defense, much less dispositive is certainly a debatable question.

[6]Counsel for Morris contended at oral argument that the effects of Forsyth's sexual inducement carried over into the December 28th sale. We do not agree. The testimony concerning the last

testimony as to count 4. To avoid injustice to a defendant, however, this Court will vacate the unreviewed convictions, leaving the Government free to challenge that action if need be in the

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Footnote 6 Continued

cocaine deal makes it clear that the jury could conclude that it was considered by all parties to be a purely commercial transaction.

Moreover, even if Morris could prove that he was in fact moved to sell $18,000 worth of a controlled substance in the hope of finally getting Forsyth "into bed," we would find as a matter of law that such a desire goes beyond all logic or reason. Morris himself admitted some suspicion of Forsyth's sincerity long before the fourth sale, and he points to no subsequent advances in their "relationship." In short, after six weeks of unrequited lust, Morris' asserted motivation would be so irrational as to be a "mental disease, defect, or other condition" affecting his mental state to commit the offense. In that case, of course, the tendered expert testimony would squarely fall within the ambit of Rule 12.2(b) and require proper notice.

future. See, e.g., United States v. Montemayor, 703 F.2d 109 (5th Cir. 1983); United States v. Cardona, 650 F.2d 54 (5th Circ. 1981). We thus vacate the convictions on counts 2 and 3.

Finally, Morris asserts that the Government failed to disprove his claim of entrapment. Of course, we now only examine the sufficiency of evidence disproving entrapment as to count 4. We consider the evidence in the light most favorable to the Government, Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), and resolve all reasonable inferences and credibility choices in favor of the jury's verdict, United States v. Juarez, 566 F.2d 511, 513 (5th Cir. 1978). We look only to whether a reasonable trier of fact could

have found beyond a reasonable doubt that Morris was predisposed to distributing cocaine and was thus not entrapped. United States v. Garrett, 716 F.2d 257, 268 (5th Cir. 1983), quoting United States w. Webster, 649 F.2d 346, 349 (5th Cir. 1981) (en banc). Of course, the question of entrapment was one for the jury. United States v. Benavides, 558 F.2d 308, 310 (5th Cir. 1977). Our reading of the record provides ample evidence that the jury could properly accept to support a finding of Morris' predisposition to sell cocaine and a verdict of no entrapment. Neither do we find the evidence in Morris' favor so overwhelming that it is "patently clear" or "obvious" that he was entrapped as a matter of law.

See United States v. Lentz, 624 F.2d 1280, 1287 (5th Circ. 1980).[7]

Thus, the convictions on counts 2 and 3 are VACATED and the conviction on cout 4 is AFFIRMED.

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[7]Morris' other contentions merit little discussion. Since Mayo was involved only in counts 1 and 2, and he was acquitted on count 1 and we vacate count 2, Morris' argument that the Trial Court improperly charged the jury on the meaning of "agent" is moot, as is his challenge to the Court's exclusion of evidence of Mayo's pending criminal charges. We also find that any error by the Trial Court in allowing limited evidence of Morris' previous possession and use of marijuana was harmless. We have carefully considered Morris' other claims and find that the District Court did not abuse its discretion.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 83-1280

D.C. Docket No. CR-3-83-010-H

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KENNETH HARDING MORRIS,

Defendant-Appellant.

Appeal from the United States District
Northern District of Texas

Before BROWN, REAVLEY and WILLIAMS,
Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, vacated on counts 2 and 3, affirmed on count 4.

March 5, 1984

Issued as Mandate:

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 83-1280

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

KENNETH HARDING MORRIS,

Defendant-Appellant.

Appeal From The United States District Court For The Northern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 5, 5 Cir., 1984, _____ F.2d_____)

(April 4, 1984)

Before BROWN, REAVLEY and WILLIAMS, Circuit Judges.

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor Judge in

regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it,

rehearing en banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 83 1280

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KENNETH HARDING MORRIS,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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O R D E R :

[ ] The motion of _____

for [XX] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

[x] The motion of appellant_____ for [XX] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including May 11, 1984 the stay continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed

with the Clerk of this Court within that time.

[ ] The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

[ ] The motion of _____ for a further stay of the issuance of the mandate is DENIED.

/s/JOHN R. BROWN

UNITED STATES CIRCUIT JUDGE

THE COURT: All right. I will deny the motion and let me say this and this appears I think for the purposes of the record. There are lots of grounds for denial of the motions.

The Defendant is a white male so stipulated previously and the Court so observes. He brings this Motion to Dismiss the Indictment because he says the Judges of this District have discriminated in the selection of a foreman or foreperson of the Grand Jury. It would appear that he may have standing to do so although I have some real doubts about that. The Defendant alleges among other things in connection with his Motion to Dismiss that he is entitled to a random selection and that is not questioned but that the classes of Blacks, Latin

Americans and woman have been underrepresented in the office of Grand Jury foremen resulting to his prejudice and that therefore the actions of the Grand Jury which indicted hm, and I ather also the previous Grand Juries are in form.

He states also that the District Judges of this District have abused the judicial process in discriminating against the Class in selection of Grand Jury foremen.

That the Jury Plan has been filed and that -- I want to be sure that I summarize fairly Defendant's grounds but I think I will leave the record to speak for itself.

I started to say it is denied on several alternate and cumulative bases.

One -- oh, yes, the Defendant

also says that Rule 6(c) which provides for the Court to appoint the Grand Jury foremen and the deputy foreman is invalid and I assume should be stricken by the Court.

The Court is of the view, one, the office of Grand Jury foreman, and I have had occasion when I was United States Attorney to work with quite a number and it appears from the Rule and it appears from the Texas and appears from the cases and the Court finds based on his personal experience that the office of foreman is a ministerial office with very little, if any, discretion attached to it. The Court notes and I think it is important that there is no attack on the composition of the Grand Jury itself and the Court notes further there is a presumption of

regularity in these proceedings and that presumption is not overcome.

The Court finds first that there is not standing to challenge the selection procedure because the duties of the Grand Jury foreman would not seem to be constitutionally significant. Judge Porter has so held recently on a similar attack by Mr. McColl in a case in his court.

Now, I go further and say this out of an abundance of caution. I had a -- decided to have an evidentiary situation. Mr. McColl was allowed to present and it has been stipulated as to who has been named by the Judges of this District as foremen. Judge Belew empaneled the Grand Jury which indicted the Defendant Mr. Morris in this case. He had filed here an affidavit in which he mentions that he

has empaneled four Grand Juries since he had been on the bench in this District and that the factors that he considered are the factors having to do with quality of leadership, organization and management which will aid the overseeing the regular and efficient operation of the Grand Jury. He considered the work history and occupation of each juror as revealed on the jury form and the apparent neatness, demeanor and attentiveness. He did not consider race or sex as factors in selecting a foreperson.

So, assuming that a prima facie case of discrimination is made and, I mention this purely as an alternate ground, that has been rebutted by Judge Belew's affidavit and therefore on either ground and based on the evidence before me I find no

discrimination.

Secondly, I find since there was no evidentiary hearing, I find with Judge Porter that there is no standing to challenge the procedure.

And third even putting that aside I think the standing of this Defendant to question is of dubious validity and that there is no statutory attack on the Plan for this District.

I will not say that the motion was frivolous but I do not think that the motion has merit.

All right. That will dispose of the motion and I don't mean to lay a predicate for holding an evidentiary hearing every time something like that comes up accusing the Judges of this District of discrimination in the selection of Grand

Jury forepersons. It seems to me to portray a certain lack of knowledge I suppose in the operation of the Grand Jury but that is something we will put up with for the time being.

THE COURT: All right. The question before the Court is the testimony of Miss Marshall and Dr. Grigson. Do you have other expert testimony bearing on the mental condition of the 12.2(b) situation?

MR. McCOLL: Your Honor, we didn't offer this as bearing on mental condition. Let me state that for the record.

THE COURT: I don't agree with you and I think you are mousetrapping the Court the way you conducted it but you are at liberty to put it on the record as you wish.

MR. McCOLL: All along we felt that there was nothing inconsistent with and we said nothing consistent with our client's mental state that was incon-

sistent with the charge and I think even our own expert has answered that he was knowingly and intentionally acting here and none of our experts have given testimony to counteract the mental element of knowingly and intentionally. We didn't offer it for that purpose so therefore we didn't and still do not feel that fell within Rule 12.2(b) and in addition of course we had researched the case and seen the case appealed the Court referred to yesterday and because we saw that as authority for the proposition that there was no notice required and because we weren't offering -- because we were offering it for the same reason we offered in Hill. I know the Court is aware but for the record United States v. Hill 655 Fed 2nd 512 we felt that we were

on solid ground both from a factual and legal standpoint in presenting the evidence in the manner that we did.

THE COURT: All right. Anything else? Any other expert testimony?

MR. McCOLL: No, Your Honor.

THE COURT: All right. The question before the Court is whether the testimony of Dr. Marshall and Dr. Grigson is properly excluded pursuant to Rule 12.2(b) of the Federal Rules of Criminal Procedure and I continue to be of the view that it was. It seems to me clearly that the testimony offered by each of those witnesses this morning confirms the Court that it was directed to matters covered under 12.2(b). Indeed, the question asked was his will over borne was directly to the point of 12.2(b). I have

looked at Hill and I know that counsel -- I am glad I anticipated it because counsel did not advise the Court of Hill until just at the time he proposed Grigson yesterday so far as I know. Hill is a case out of the Third Circuit where 12.2(b) was not required. 12.2(b) of course requires any notice of this kind of defense be given to the prosecution in the interest of fairness. That is any time that testimony of an expert relates to mental condition or any other affected condition bearing upon the issue of whether the Defendant has the mental state required for the offense charged. In Hill the Defendant was indigent. He was represented by appointed counsel. Defendant did not know until during the trial that entrapment was a possible

defense. I am, I guess I understate when I say I am surprised at the tactics. Here we have two experts who were consulted weeks and weeks ago and apparently -- well, not apparently. Obviously defense counsel did not advise the Court, did not advise the prosecution that they would be used. It was in my judgment a knowing violation fo 12.2(b). I will not remark upon the tactics involved in that but I am satisfied that the testimony was properly excluded.

Anything else?

MR. McCOLL: As an alternative to excluding it, Your Honor, we would ask the Court to consider simply delaying the matter if the Court wants to give the prosecutor time to have a court ordered examination of the client so that it is

not such a drastic remedy for the matter. The jury is still --

THE COURT: Oh come on, now. The jury has been charged, the jury is out and we are not going to come back and retry the case while the jury is deliberating. You know better than that and the whole idea of 12.2(b) is you are not going to have the kind of delay we are talking about and you have purposefully done it and you can pay the price for it.

MR. McCOLL: We object.

THE COURT: I must say to you I do not want your coming back into this court and doing that kind of thing.

MR. McCOLL: Your Honor, we object to that remark that there was anything done on purpose.

THE COURT: You may have your objec-

tion. I don't want you coming back into court violating a Rule of Federal Criminal Procedure.

MR. McCOLL: Your Honor, we didn't feel it was a violation.

THE COURT: Well, you --

MR. McCOLL: We certainly wouldn't have done it intentionally.

THE COURT: Well, I think you did it intentionally and that is my view.

MR. McCOLL: Okay, Your Honor. I am telling you --

THE COURT: Anything else? Sir?

MR. McCOLL: I am telling you that is not the case.

THE COURT: Yes, sir. Well, that is my view. Anything else?

THE COURT: Well, you have -- just because this man is a white male and claiming of dominance of white males is one of those rare situations but the Supreme Court says he can do that. I find myself very inclined towards Judge Porter's opinion but I think I will go ahead and have the hearing. Now, what kind of ground rules do you want to set on that? Can you make some sort of stipulation as to the -- to these Grand Jury foreman back over a period of time, whether they were white male or female or whatever?

No. 83-1852

In the Supreme Court of the United States

OCTOBER TERM, 1984

KENNETH HARDING MORRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether alleged discrimination against women and blacks in the selection of grand jury foremen provides a basis for seeking dismissal of an indictment returned against a white male by the grand jury.

2. Whether testimony by two psychologists pertaining to petitioner's susceptibility to sexual enticement, offered in support of an entrapment defense, was properly excluded pursuant to Rule 12.2(b) of the Federal Rules of Criminal Procedure because of petitioner's failure to give advance notice of his intention to rely on such testimony.

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1A-25A) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 26A-27A) was entered on March 5, 1984. A petition for rehearing was denied on April 4, 1984 (Pet. App. 28A-30A). The petition for a writ of certiorari was filed on May 10, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on three counts of distributing cocaine, in violation of 21 U.S.C. 841(a)(1). He was sentenced to four years' imprisonment on counts 2 and 3 of the indictment, to run concur-

rently with a term of 10 years' imprisonment on count 4.[1] In addition, petitioner received a 3-year special parole term on each count and a fine of $10,000. Pet. App. 14A.

1. The evidence at trial showed that in October 1982, petitioner's former girlfriend, Dianne Mayo, contacted the United States Drug Enforcement Administration (DEA) and offered her assistance in locating drug traffickers. After her approach to the DEA, Mayo began asking petitioner to procure cocaine for herself and a "friend," Julie Williams, who was coming to visit from New York. Mayo told petitioner that Williams was also coming to escape from marital constraints and to "party." "Williams" was in reality Dallas Police Department narcotics investigator Jan Forsyth (Pet. App. 3A-4A).

Petitioner eventually agreed to sell Mayo and Forsyth one-eighth of an ounce of cocaine and met the two women at a coffee shop on November 19, 1982 to consummate the deal. Forsyth paid petitioner $300 for the drug (Pet. App. 4A). Petitioner met the two women again on December 1, 1982 at another restaurant. This time, petitioner took Forsyth for a drive without Mayo and suggested that he and Forsyth meet some time for a drink or go to a restaurant. Forsyth agreed, but also told petitioner that she was staying with her "boyfriend" in Dallas. Forsyth gave petitioner $600 for one-quarter ounce of cocaine. Both parties agreed to exclude Mayo from any future cocaine transactions, and petitioner gave Forsyth his telephone number so that she could contact him directly. Back at the restaurant before Forsyth left petitioner's car, petitioner kissed her on the cheek. Pet. App. 5A-7A.

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[1]Petitioner was acquitted on count 1, which also charged him with distributing cocaine (Pet. App. 13A).

Thereafter, Forsyth called petitioner to arrange for future cocaine transactions. At one meeting in a bar, Forsyth attempted to negotiate another cocaine purchase. Although she again made reference to her boyfriend, petitioner attempted to engage Forsyth in a sexual relationship, inviting her to accompany him to a Carribean Island, and suggesting that they should "go to bed at least as friends" (Pet. App. 8A). Forsyth rebuffed petitioner's advances; however, she was subsequently able to arrange a meeting on December 10, 1982, between petitioner and herself, to be attended by her "boyfriend" (in reality another Dallas police officer). At that meeting, the undercover officers negotiated a purchase of one ounce of cocaine from petitioner. Pet. App. 8A-9A. On December 11, petitioner confirmed that he could provide the pair with one ounce of cocaine for $2,300. The three again met at a coffee shop, where petitioner invited the two officers to go for a drive in his car. After petitioner pulled the car over on a side street, he handed the "boyfriend" a plastic bag containing one ounce of cocaine, and Forsyth gave petitioner $2,300. Pet. App. 9A-11A.

Forsyth continued to call petitioner over the next couple of weeks in an attempt to secure an even larger amount of cocaine. Petitioner agreed to furnish a half-pound of cocaine and met with Forsyth briefly at a restaurant to discuss the deal. He and Forsyth then drove to petitioner's house. Forsyth left a few minutes later on a pretext. Pet. App. 11A-12A. On December 28, petitioner, Forsyth and her "boyfriend" met at a restaurant. After petitioner checked the officers' proffered $18,000, the trio entered a car driven by George Anderson, who was introduced as petitioner's partner on the deal, drove a short distance and parked. Petitioner and Anderson showed the officers two plastic bags each containing a quarter of a pound of cocaine, and the officers tested the powder to confirm its

quality. Upon returning to the restaurant, petitioner was arrested. Pet. App. 12A-13A.

Testifying in his own defense, petitioner admitted delivery of the cocaine but contended that he was "sexually entrapped" by what he claimed he had understood as implied promises by Forsyth to have sex with him if he supplied her with cocaine. Forsyth testified that petitioner had made advances but denied any physical involvement and maintained that she had informed petitioner that their meetings were "strictly business." See IV Tr. 106, 141, 143, 145, 150-151, 153-155, 166-169, 173.

2. On appeal, petitioner challenged the denial of his pretrial motion to dismiss the indictment. That motion was based on alleged discrimination against blacks and women in the selection of federal grand jury foremen in the district in which he was indicted, which, he claimed, denied him the equal protection of the laws. Petitioner's claim rested upon a stipulation that 18 of the 22 federal grand jury forepersons selected in the judicial district over the preceding seven years were white males. The government sought to rebut any inference of discrimination with the affidavit of the district judge who had appointed the foreperson of the grand jury that had indicted petitioner, which indicated that the appointing judge had not taken race or sex into account either in that appointment or in any of the others he had made. While questioning petitioner's standing, as a white male, to raise the discrimination claim, the district court reached the merits, ruling that the position of federal grand jury foreperson is ministerial and that discrimination in this context would not warrant dismissal of the indictment (Pet. App. 34A-36A). The district court ruled in the alternative that any prima facie case of discrimination had been rebutted (*id.* at 37A-39A).

The court of appeals found it unnecessary to reach the merits, ruling instead, in conformity with its decision in *United States* v. *Cronn*, 717 F.2d 164 (1983), cert. denied, No. 83-979 (July 5, 1984), that petitioner lacked standing to raise an equal protection claim (Pet. App. 16A-17A). The court of appeals declined to consider a due process challenge to the foreperson selection process, observing that, like the defendant in *Cronn*, petitioner had not raised any due process issue in the district court (Pet. App. 17A-18A n.4).

Petitioner also argued on appeal that the district court had improperly excluded testimony from a psychiatrist and a clinical psychologist who would have testified that he was particularly susceptible to sexual enticement. The district court had ruled that the proffered testimony related to a mental disease or defect and excluded it under Fed. R. Crim. P. 12.2(b), because petitioner had failed to provide proper advance notice. Petitioner conceded that he had not provided notice of his intention to introduce expert testimony, but he argued that because the expert testimony related only to whether or not he was especially vulnerable to entrapment, Rule 12.2(b) was not applicable. The court of appeals declined to decide whether the district court had properly applied Rule 12.2(b) (Pet. App. 19A). Instead, invoking the concurrent sentence doctrine and finding that there was no credible evidence of sexual entrapment as to the penultimate sale of cocaine by petitioner, which was the basis for the conviction on count 4, the court of appeals affirmed only petitioner's conviction on that count, vacating petitioner's conviction on the remaining two counts (Pet. App. 19A-23A).

ARGUMENT

1. Petitioner challenges (Pet. 11-20) the district court's ruling that, as a white male, he lacked standing to seek dismissal of his indictment based on allegations of discrimination against blacks and women in the selection of grand

jury forepersons. Petitioner appears to argue both that he has standing to present an equal protection challenge and that, contrary to the court of appeals' reading of the record, he also presented a due process challenge. These contentions do not warrant further review.

Petitioner's contentions are identical to those raised in *Cronn* v. *United States,* cert. denied, No. 83-979, (July 5, 1984). For the reasons stated in our Brief in Opposition in that case, the court of appeals' standing ruling is correct, and there is no reason to review the fact-bound question whether the court of appeals mistook the gravamen of the claim petitioner presented in the district court.[2] In any event, this Court's decision in *Hobby* v. *United States,* No. 82-2140 (July 2, 1984), strongly supports the court of appeals' ruling on the standing issue as to any equal protection claim. See slip op. 7-8. *Hobby* also establishes that petitioner could in no event have prevailed upon any due process claim. Accordingly, certiorari should be denied here, just as it was in *Cronn* subsequent to the decision in *Hobby*.

2. Petitioner argues (Pet. 20-38) that the district court's exclusion of testimony by two mental health professionals about his alleged special susceptibility to sexual enticement violated his due process right to offer relevant evidence in his defense. Petitioner contends that the district court improperly relied upon Fed. R. Crim. P. 12.2(b) in excluding the testimony because of his failure to give proper notice. He argues that his entrapment defense and his "special vulnerability" argument were not intended to negate the mental state required for the offense charged and that accordingly, under the language of Rule 12.2(b) as it stood at the time of his trial, he was not required to give advance

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[2]Petitioner's counsel represented the petitioner in *Cronn* as well.

notice of his intent to utilize expert psychological testimony.[3] Petitioner also takes issue with the court of appeals' conclusion (Pet. App. 21A-22A) that there was no evidence of sexual inducement bearing on count 4 and that exclusion of expert testimony as to that count was therefore proper in any event. The court of appeals correctly rejected petitioner's arguments.

As petitioner recognizes (Pet. 33), Rule 12.2(b) was amended subsequent to his trial to make clear that expert testimony on psychological susceptibility to entrapment is within the rule's notice requirement. Prior to the amendment, it was unclear whether the notice requirement applied to situations in which expert testimony about a defendant's mental condition was offered on novel theories of relevance. Compare *United States* v. *Hill*, 655 F.2d 512 (3d Cir. 1981), and *United States* v. *Webb*, 625 F.2d 709 (5th Cir. 1980), with *United States* v. *Perl*, 584 F.2d 1316 (4th Cir. 1978), *United States* v. *Olson*, 576 F.2d 1267 (8th Cir. 1978), and *United States* v. *Staggs*, 553 F.2d 1073 (7th Cir. 1977). Because the notice question has recently been resolved by a clarifying amendment to the rule, and because

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[3]Rule 12.2(b) as it stood at the time of petitioner's trial provided in pertinent part:

> **(b) Mental Disease or Defect Inconsistent with the Mental Element Required for the Offense Charged.** If a defendant intends to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall * * * notify the attorney for the government * * *.

Rule 12.2(b) (as amended Apr. 28, 1983 and effective Aug. 1, ~~983~~ 1983 presently provides:

> **(b) Expert Testimony of Defendant's Mental Condition.** If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of his guilt, he shall * * * notify the attorney for the government * * *.

the court of appeals did not even pass on the issue, there is no occasion for this Court to give a definitive interpretation of the language of the now obsolete version of Rule 12.2(b).

There is in any event no reason for this Court to resolve the fact-bound dispute between petitioner and the court of appeals as to whether there was sufficient evidence of entrapment with respect to count 4 of the indictment (upon which his conviction was sustained) to require the court to reach the question whether advance notice of the proffered expert testimony was necessary. Because the male undercover agent, introduced to petitioner as the female agent's "boyfriend," was an active participant in the transaction that was the basis for count 4 (see page 3, *supra*), any claim of entrapment based on implied sexual promises is, in this context, wholly incredible.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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